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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 342.

SHELDON C. VINSONHALER, A. L. CHILTON, and LEONORE H. CHILTON, A Partnership, d/b/a KGHI Broadcasting Service, and the ARKANSAS RADIO AND EQUIPMENT COMPANY, A Corporation (KARK Broadcasting Station), *Appellants,*

v.

ROY BEARD, Collector for the City of Little Rock, Arkansas, *Appellee.*

Appeal from the Supreme Court of the State of Arkansas.

BRIEF OF NATIONAL ASSOCIATION OF BROADCASTERS, AMICUS CURIAE, SUPPORTING APPELLANTS' PETITION FOR REHEARING FOLLOWING PER CURIAM DISMISSAL OF APPEAL FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION.

The National Association of Broadcasters is a non-profit association consisting of more than 1,700 radio broadcast licensees engaged in AM, FM and television broadcasting throughout the United States. This case presents a question of great importance to the broadcasting industry. If the decision of the Arkansas Supreme Court is allowed to stand without plenary hearing and full opinion by this

Court, broadcasting stations, as well as state and municipal taxing authorities, will be in doubt as to the limits of permissible taxation. Because radio broadcasting stations, by virtue of decisions of this Court, had previously been considered to be constitutionally immune from such taxes, the dismissal will lead to lengthy and costly litigation between radio broadcasters and state and city taxing authorities.

The ordinance of the City of Little Rock brought into question by this case declared to be a privilege and imposed an annual tax amounting to $250 upon "the conducting or carrying on of the business of producing or generation of electro-magnetic waves within the City of Little Rock for the purpose of broadcasting by radio transmission" or "the operation of the business of intra-state radio broadcasting within the City of Little Rock." (Appellants' *Statement as to Jurisdiction*, p. 3). This tax was enjoined and declared unconstitutional by the Arkansas trial court, but on appeal the judgment of the trial court was reversed by the Arkansas Supreme Court in a divided opinion. (Appellants' *Statement as to Jurisdiction*, p. 5; Appendix, pp. 11-20).

On November 7, 1949, the Supreme Court of the United States dismissed the appeal in the above entitled cause for want of a substantial federal question, citing *Crutcher* v. *Kentucky*, 141 U.S. 47 (1891).

Appellants have filed a petition for rehearing pursuant to Rule 33 of the Supreme Court of the United States and this brief is filed in support of appellants' petition pursuant to Rule 27(9)(b) of that Court. Consent of, and proof of service upon all parties to the case is filed herewith.

THIS CASE PRESENTS A SUBSTANTIAL FEDERAL QUESTION.

The Court has defined as insubstantial those questions which are "wholly formal . . . so absolutely devoid of merit as to be frivolous . . . so explicitly foreclosed by a decision or decisions of this court as to leave no room for real con-

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troversy" (*Equitable Life Assurance Soc'y* v. *Brown*, 187 U.S. 308, 311 [1902]) or "which require (no) analysis (or) exposition for (their) decision • • • so wanting in substance as not to need further argument" (*Milheim* v. *Moffat Tunnel Improvement Dist.*, 262 U.S. 710, 716, 717 [1923]).

While these principles are broad, and while the scope of the Court's discretion in exercising jurisdiction over appeals has steadily widened with the greatly increased workload placed on the Court, it is submitted that it can be conclusively demonstrated, at the very least, that the questions lying at the base of this appeal are ones which cannot be regarded as foreclosed by prior decisions of the Court without extensive analysis and exposition. Indeed, it is urged that such analysis and exposition would require the federal questions presented to be resolved in favor of Appellants. However that may be, "the issue is not whether the federal question relied upon will be found, upon an examination of the merits, to be unsound, but whether it is apparent that such question has been so explicitly foreclosed as to leave no room for contention on the subject . . ." *Louisville & Nashville RR* v. *Melton*, 218 U.S. 36, 49 (1910).

While complete argument on the merits should await a plenary hearing, it is necessary to enter far enough into a discussion of the cases to show that these issues are not so free from difficulty as to warrant a divestiture of jurisdiction.

1. The Propositions of Law Which the Court, by the Dismissal of the Appeal in this Case, Indicates as Settled, Are in Fact Not Settled, but Result in Conflict With Other Decisions of the Court.

In dismissing the appeal and citing *Crutcher* v. *Kentucky*, 141 U.S. 47 (1891), to demonstrate that the law is so explicitly foreclosed as to leave no room for real controversy, the Supreme Court has left the radio broadcasting industry, as well as state and municipal tax authorities, in doubt as to which of two propositions of law it considers settled—

whether it be (a) that the business of broadcasting to listeners within and without the state in which a station is located can be constitutionally characterized as *intrastate* commerce so as to justify state taxation of such commerce or (b) that the generation of electro-magnetic waves is a *local incident, distinct from the commerce itself,* which may be constitutionally taxed.

a. If the dismissal is considered as standing for the proposition that a tax laid on the business of radio broadcasting is one validly laid on an intrastate activity, it is in conflict with other decisions of this Court.

Crutcher v. *Kentucky* held that a flat annual license tax imposed by a state upon an express company handling both interstate and intrastate shipments was an unconstitutional burden upon interstate commerce. *See* the most recent interpretation of the *Crutcher* case in *Interstate Oil Pipe Line Co.* v. *Stone,* 93 L. Ed. 1163, 1173 (1949) (dissenting opinion by Reed, J., joined by Vinson, C. J., Frankfurter, J., and Jackson, J.): "Phrased in terms of a privilege for carrying on an interstate business, such a tax historically has been deemed unconstitutional. The cases abound in statements to the effect that the privilege of carrying on interstate commerce itself is immune from state taxation."

Cooney v. Mountain States Teleph. & Teleg. Co., 294 U.S. 384 (1935), contains one of the clearest expositions of the *Crutcher* line of authority which can be found in the United States Reports. In it, the Court said, at p. 393:

> There is no question that the State may require payment of an occupation tax from one engaged in both intrastate and interstate commerce. But a State cannot tax interstate commerce; it cannot lay a tax upon the business which constitutes such commerce or the privilege of engaging in it. And the fact that a portion of a business is intrastate and therefore taxable does not justify a tax either upon the interstate business or upon the whole business without discrimination. • • • Where the tax is exacted from one doing both an inter-

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state and intrastate business, it must appear that it is imposed solely on account of the latter; that the amount exacted is not increased because of the interstate business done; *that one engaged exclusively in interstate commerce would not be subject to the tax; and that the one who is taxed could discontinue the intrastate business without also withdrawing from the interstate business.* * * * A privilege or occupation tax which a State imposes with respect to both interstate and intrastate business, through an indiscriminate application to instrumentalities common to both sorts of commerce, has frequently been held to be invalid. (Italics added)

What can be drawn from this?

(1) If some part of Appellant radio stations' activity is "intrastate broadcasting" and the rest is "interstate broadcasting," then *Crutcher* v. *Kentucky*, while in point, is not controlling unless it is shown that the stations could discontinue their "intrastate broadcasting" without also withdrawing from their "interstate broadcasting." The Supreme Court *has never held that mixed interstate and intrastate activity which is physically inseparable could be reached by an indiscriminate tax upon the business as a whole.* It has never held that a tax could be validly imposed on the privilege of doing an intrastate business, where such business was physically inseparable from interstate activities, *viz., where the identical acts constituted doing both interstate and intrastate commerce.* Cf. *Bowman* v. *Continental Oil Co.*, 256 U.S. 642 (1921). In all the cases in which a tax was upheld where imposed on a business consisting of both *inter* and *intra*state commerce, it has been *physically possible* to separate the two spheres of operation, although commercially "impossible" to do so. For example, *Pacific Teleph. & Teleg. Co.* v. *Tax Commission*, 297 U.S. 403 (1936).

(2) If Appellant radio stations' activity is exclusively interstate, then *Crutcher* v. *Kentucky* is authority for the invalidation of the tax, *not* for sustaining it; the privilege

of engaging in interstate commerce cannot be taxed. *See Memphis Natural Gas Co.* v. *Stone*, 335 U.S. 80, 88 (1948) and cases cited at note 10.

(3) If Appellant radio stations' activity is exclusively *intrastate*, then, and only then, would the *Crutcher* case be controlling authority for sustaining the tax and dismissing the cause *per curiam*.

The federal question involved is plain. Is radio broadcasting intrastate commerce? The answer is found in *Fisher's Blend Station* v. *Tax Commission*, 297 U.S. 650 (1936), the only case involving state or local taxation of radio broadcasting stations which has previously come before this Court. That case held unconstitutional a state privilege tax levied on the business of radio broadcasting. There, the tax authorities argued, as they do here, that radio broadcasting is, as a practical matter, *intrastate*, notwithstanding the fact that radio transmission cannot be confined within state lines. The state court upheld the tax on the ground that the business from which the appellant radio station received his income was not interstate commerce.

The Supreme Court of the United States, per Stone, J., rejected this argument and struck down the tax, stating at pp. 654-655:

> Whether the transmission is effected by the aid of wires, or through a perhaps less well understood medium, "the ether," is immaterial, in the light of those practical considerations which have dictated the conclusion that the transmission of information interstate is a form of "intercourse," which is commerce. See *Gibbons* v. *Ogden*, 9 Wheat. 1, 189, 6 L. ed. 23, 68. • • • The essential purpose and indispensable effect of all broadcasting is the transmission of intelligence from the broadcasting station to distant listeners. • • • By its very nature broadcasting transcends state lines and is national in its scope and importance—characteristics which bring it within the protection, and subject it to the control, of the commerce clause. See *Federal Radio Commission* v. *Nelson Bros. Bond & Mortg. Co.*,

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> 289 U.S. 266, 279, 77 L. ed. 1166, 1175, 53 S. Ct. 627, 89 A.L.R. 406. * * * As appellant's income is derived from interstate commerce, the tax, measured by appellant's gross income, is of a type which has long been held to be an unconstitutional burden on interstate commerce.

In *Western Live Stock* v. *Bureau of Revenue*, 303 U.S. 250 (1938), the Court re-affirmed the *Fisher's Blend* case and said, at p. 260:

> There the exaction was a privilege tax laid upon the occupation of broadcasting, which the Court held was *itself interstate communication*, comparable to that carried on by the telegraph and the telephone, and was measured by the gross receipts derived from that commerce. * * * In form and in substance the tax was thought not to be one for the privilege of doing a local business separable from interstate commerce. (Italics added)

There is no factual differentiation between the business of the radio station in the *Fisher's Blend* case, and that in this; both received receipts from sources inside and outside the taxing state; both broadcast transmissions which were received by listeners both inside and outside the taxing state. There was, to be sure, a difference in the kind of tax levied—one a gross receipts tax, the other a flat annual fee. That difference, however, does not bear upon the question whether radio broadcasting is interstate or intrastate in character.

In sum, *Crutcher* v. *Kentucky* can only be regarded as a controlling precedent if it is assumed that the Little Rock tax is laid upon an intrastate activity.

Certainly this Court is not bound by the Arkansas characterization of Appellants' business. Whether radio broadcasting can be constitutionally characterized as intrastate, interstate, or both, is to be finally determined by the Supreme Court of the United States. A state court cannot foreclose United States Supreme Court appraisal of undisputed facts of record where such an appraisal or examina-

tion is necessary in order to determine whether an asserted federal right or immunity is to be sustained. *Hooven & Allison Co.* v. *Evatt*, 324 U.S. 652 (1945); *Interstate Oil Pipe Line Co.* v. *Stone*, 93 L. Ed. 1163 (1949); Id., *See* dissent, at 1169. Therefore, although the Little Rock ordinance imposed a tax in terms only upon the business of "intrastate radio broadcasting," and the Arkansas Supreme Court held that the tax was applicable to the business of the Appellant radio broadcasting stations,* the Supreme Court of the United States is not foreclosed from a determination of this basic federal question, *viz., whether broadcasting is subject to tax as intrastate commerce.* Indeed, without a holding by the state court that the tax is applicable to Appellants, the Supreme Court of the United States would not review the constitutionality of the tax. *Spector Motor Service* v. *McLaughlin*, 323 U.S. 101 (1944).

It has been shown that the applicability of *Crutcher* v. *Kentucky* as a controlling authority depends upon an assumption that radio broadcasting has been *established* to be intrastate. It has been shown that in the only radio taxation case which has come before it, the Supreme Court of the United States *reversed* a state court determination that radio broadcasting was intrastate commerce. It may be assumed that the Court does not intend, by a *per curiam* dismissal of this cause, to overrule the *Fisher's Blend* case. In any event, whether or not *Fisher's Blend* so forecloses the issue as to justify a statement that no part of radio broadcasting may be constitutionally regarded as intrastate commerce, the existence of *Fisher's Blend*, unreversed, creates just that condition of precedent which makes "analysis and expounding . . . necessary in order to make clear the decisive effect of the prior decisions upon the issue here presented." *Louisville & Nashville RR Co.*

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* The following cases held that such a tax was *inapplicable* to radio broadcasting stations, on the ground that there is no such business as "intrastate radio broadcasting": *Atlanta* v. *Southern Broadcasting Co.*, 184 Ga. 9, 190 S. E. 594 (1937); *Atlanta* v. *Atlanta Journal Co.*, 186 Ga. 734, 198 S. E. 788 (1938).

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v. *Melton*, 218 U.S. 36, 49 (1910). In such a situation the Court should not undertake the responsibility of pronouncing authoritatively upon the law without the aid of plenary briefs and argument.

b. If the dismissal is considered as standing for the proposition that the generation of electro-magnetic waves is a taxable local incident, distinct from the commerce itself, it cannot be justified on the basis of existing decisions of this Court.

The only other proposition of law, involved in the case, which might have been assumed to be established, is that the generation of electro-magnetic waves for the purpose of broadcasting is a *local incident, distinct from the commerce itself*, which may be constitutionally taxed. It is recognized that the Court, in its memorandum opinions, does not cite all the decisions which it considers applicable. Nevertheless, the failure of the Court to cite a decision (*Utah Power & Light Co.* v. *Pfost*, 286 U.S. 165 [1932]) which the lower court relied on as authority for upholding the tax, and which was suggested as a basis for radio station taxation in the *Fisher's Blend* case, would strongly indicate that the dismissal is not rested upon this proposition of law. Clearly, *Crutcher* v. *Kentucky* is not authority for the proposition that the generation of electro-magnetic energy is a taxable local incident.

It is enough to say that the issue—whether or not the generation of electro-magnetic waves for the purpose of radio broadcasting is a separable local event, distinct from the commerce itself, within the meaning of cases like *Utah Power & Light Co.* v. *Pfost, supra, Western Live Stock* v. *Bureau of Revenue*, 303 U.S. 250 (1938), and *Coverdale* v. *Arkansas Louisiana Pipe Line Co.*, 303 U.S. 604 (1938), has never before been determined by the Court. The *Pfost* case, upon which the Arkansas Supreme Court relied, involved the taxation of an economically significant activity, namely, the production of electric energy. Such energy has a value

independent of its transmission interstate. It may be sold by the producer and transmitted by someone else. But the *electro-magnetic** energy needed for radio transmission is not of independent value. Everything done by the radio station prior to the actual transmission of the electro-magnetic wave is a component part of the act of radio broadcasting. The wave is generated within the microphone itself by the sound waves of the voice striking the electromagnet located within the microphone housing. (Transcript of Record, pp. 46-48). It is this event which the framers of the ordinance have attempted to tax. The energy so created has significance only insofar as it furthers the broadcaster's purpose, "the transmission of intelligence to distant listeners" which "was itself interstate communication."

It is submitted that the selection of this incident does not meet the test of a "definite separation between the taxable event and the commerce itself." *Joseph* v. *Carter & Weekes S. Co.*, 330 U.S. 422, 433 (1947). It is not enough merely to select some localized activity, for "[If] the only thing necessary to sustain a State tax bearing upon interstate commerce were to discover some local incident which might be regarded as separate and distinct from the 'transportation or intercourse' which is the commerce itself and then to lay a tax on that incident, all interstate commerce

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* Wiener, *A New Concept of Communication Engineering*, ELECTRONICS, Jan. 1949, p. 74: "Electrical engineering is divided into two main branches, termed Power Engineering and Communication Engineering. For power purposes, the construction of dynamos, motors and transformers involves apparatus that carries considerable energy. The purpose of the whole system is the economical use of energy. On the other hand, although it is true that considerable power is used to transmit information, communication engineering is not directly concerned with power. Except for the infinitesimal remnant that actuates the receiving apparatus, this power is wasted. * * * The distinction between these two types of electrical engineering is that power engineering is primarily concerned with the transmission of energy as a usable commodity which must not be wasted unnecessarily, while communication engineering is concerned with the transmission of information."

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could be subjected to state taxation and without regard to the substantial economic effects of the tax upon the commerce." *Nippert* v. *City of Richmond*, 327 U.S. 416, 423 (1946).

It is not necessary here to further argue the cases. It is enough to show that the issue is one which has not previously been determined by the Court and which can only be properly determined after a plenary hearing on the merits.

2. The Controverted Issue Should Not Be Regarded as so Insubstantial as to Warrant Dismissal Where (a) There Was a Division of Opinion in the Court Below and (b) the Dismissal Results in a Holding on the Merits Which is Opposed to the Great Weight of Authority in the State and Lower Federal Courts.

(a) The history of this case in the courts below would by no means indicate that existing decisions of the Supreme Court clearly point a way to the constitutional imposition of occupation or privilege taxes upon the business of radio broadcasting. It has been held that a division of opinion in the court or courts below is a circumstance which indicates that the controverted issue should not be treated as so insubstantial as to divest jurisdiction. *Louisville & Nashville RR. Co.* v. *Melton*, 218 U. S. 36 (1910).

Here, the dissenting judge of the Arkansas Supreme Court, feeling that the trial court's determination should be affirmed, regarded the issues as having been foreclosed in favor of the stations, stating:

> I think, however, that the Supreme Court of the United States, in the case of *Fisher's Blend Station* v. *Tax Commission*, 297 U. S. 650 (1936) has definitely settled all issues presented here in favor of the Appellees and the case should be affirmed. (Appendix B of Appellants' *Statement as to Jurisdiction*, p. 19).

It should be noted that Appellee did not cite *Crutcher* v. *Kentucky* in his brief before the Arkansas Supreme Court. Nor did the majority of the court cite that case in upholding the tax.

Neither did Appellee move for dismissal or affirmance in this Court or file a statement disclosing matter or ground making against the jurisdiction asserted by Appellant, as he might have done under Rule 12(3) of the Supreme Court of the United States.

Attention should also be called to the background of the tax ordinance in question. It is the result of a studied effort by the National Institute of Municipal Law Officers to devise a tax which would not be subject to the infirmities which had led to the almost uniform invalidation of taxes previously attempted to be laid by states and municipalities upon the privilege or occupation of radio broadcasting. *See* Speech, *Municipal Taxation of Radio Stations*, given by Thomas J. Gentry, city attorney of Little Rock, Arkansas, at a meeting of the Committee on Taxation and Revenues of the National Institute of Municipal Law Officers, Thursday, December 2, 1948, printed in *Municipalities and the Law in Action*, p. 34 (1949).* It was for this reason that the Little Rock ordinance, as a "test case," was carefully drawn so as to be upheld if either of the alternative bases upon which the tax was laid should be held to be constitutional. The background of this tax, therefore, illustrates that those most interested in finding a con-

* "Ever since the invention of the radio and its commercialization, the operators of radio broadcasting stations have been immune from any municipal privilege tax, while other business must pay such a tax in order that the police, fire, health and other departments of many of our municipal governments may continue to function. * * * Several states and municipalities have sought to levy a fair and just tax upon radio broadcasting stations for the privilege of doing business within their boundaries, but in each notable instance the courts have held that the kind of tax imposed and the way it was imposed constituted an undue burden upon interstate commerce and therefore void as being a tax in violation of the commerce clause of our federal Constitution." (p. 34)

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stitutional basis upon which to tax radio broadcasting stations, namely, the various city attorneys, did not believe that there was any clearly defined method made plain by existing Supreme Court precedents.

Far from being merely formal or without substance, the issues have been vigorously contested at every stage. A *per curiam* dismissal without a full opinion will almost certainly lead to further lengthy and costly litigation, in an effort by both broadcasting stations and city tax authorities to determine the limits of permissible constitutional taxation of radio broadcasting.

(b) The state and lower federal courts have consistently invalidated attempts by states and municipalities to tax the privilege of engaging in the business of radio broadcasting. It goes without saying that all of these cases have been decided since *Crutcher* v. *Kentucky*.

Flat Annual Taxes Held Invalid or Inapplicable: Whitehurst v. *Grimes*, 21 F. 2d. 787 (E. D. Ky. 1927); *Atlanta* v. *Southern Broadcasting Co.*, 184 Ga. 9, 190 S. E. 594 (1937); *Atlanta* v. *Atlanta Journal Co.*, 186 Ga. 734, 198 S. E. 788 (1938); *Tampa Times Co.* v. *Burnett*, 45 F. Supp. 166 (S. D. Fla. 1942); *Cf. Station WBT* v. *Poulnot*, 46 F. 2d 671 (E. D. S. C. 1931) [license tax on privilege of using radio receiving sets held unconstitutional burden on interstate commerce].

Gross Receipts Taxes Held Invalid: Fisher's Blend Station v. *Tax Comm.*, 297 U. S. 650 (1936); *KVL Inc.* v. *Tax Comm.*, 12 F. Supp. 497 (W. D. Wash. 1935); *Albuquerque Broadcasting Co.* v. *Bureau of Revenue*, 51 N. M. 332, 184 P. 2d 416 (1948) [holding the tax invalid as to all receipts except those derived from "local advertising"; upon remand the trial court held that it was impossible to make such an allocation and ordered the entire amount of the tax refunded to the radio station. (Opinion of Judge David W. Carmody in *Albuquerque Broadcasting Co.* v. *Bureau of Revenue*, No. 19,984 Dist. Ct., Santa Fe, N. M., unrep. 1948)].

Taxes or Fees Upheld: Atlanta v. *Oglethorpe*, 178 Ga. 379, 173 S.E. 110 (1934) [overruled by Georgia cases cited above, which regarded it as having "no binding effect"].

Thus, of nine cases in lower federal and state courts which have considered the issues involved here, only one case sustained the tax and that case was subseqeuntly overruled by the same court.

We respectfully urge that Appellants' petition for rehearing be granted, and that probable jurisdiction of the cause be noted, or in the alternative, that the question of jurisdiction be postponed until the hearing on the merits.

Don Petty,
Richard Jencks,
Attorneys for National Association of Broadcasters, Amicus Curiae.